Kerajaan Malaysia & Anor v Nurul Rabihah bt Abdul Rahman

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01(NCVC)(W)-84–02 OF 2023
SUPANG LIAN, HASHIM HAMZAH AND AZMI ARIFFIN JJCA
26 JUNE 2024

Damages — Assessment — Appeal and cross-appeal against assessment — Consent judgment recorded in which appellants admitted liability in medical negligence claim by respondent — Appellants and respondent dissatisfied with High Court's decision on quantum of damages awarded — Whether award fair and reasonable

This was the appellants' appeal and the respondent's cross-appeal against the learned judicial commissioner's ('JC') decision on the quantum of damages awarded in a medical negligence claim. On 3 May 2017, the respondent gave birth to a baby in Taiping Hospital ('the hospital'). However, it was later discovered that the respondent had suffered a third-degree perineal tear, resulting in a sphincter injury and a surgery was performed to repair the tear. On 16 May 2017, the respondent was referred to the hospital due to a wound breakdown. Perineal examination revealed that the whole length of the sutures had opened up until the anal sphincter. The anal sphincter was also found to be laxed. On 18 May 2017, a defunctioning stoma was performed on the respondent. During a follow-up session, the respondent was told to delay the sphincter injury repair and to continue with conservative management, plus the management of the stoma bags. The respondent sought second opinions and went for a few follow-ups at other specialist hospitals. On 21 June 2018, the Pusat Perubatan Universiti Malaya plastic surgery team performed graciloplasty on the respondent because of failed overlapping repair due to severe external anal sphincter injuries and associated nerve injury. The procedure was claimed to have not improved the respondent's condition. The respondent claimed that the appellants' negligence in her management had caused the injury and all the complications that she had suffered. The respondent proceeded to file this action against the appellants and a consent judgment was recorded by the parties in which the appellants admitted liability, and damages were to be assessed by the court. After a full trial, the JC made the order. The appellants and the respondent were dissatisfied with some of the awards given, and hence this appeal and cross-appeal respectively. The appellants raised the issues regarding: (a) RM1m for general damages; (b) RM100,000 for the costs of future medical treatment; (c) RM300,000 for aggravated damages; and (d) RM7,500 for the costs of the counsel's appearance and RM50,000 for advocacy costs. Meanwhile the respondent raised the issues regarding: (i) under the costs for future damages, RM6,000 for the costs of the

reversal of the stoma operation and RM3,600 for the costs of stoma bags pending the implant of the pacemaker; and (ii) RM4,000 for special damages.

Held, allowing the appellants' appeal in part and dismissing the respondent's cross-appeal:

(1) The amount awarded by the JC for general damages was extremely high and a wholly erroneous estimate of the damage suffered by the respondent. An award of RM1m for general damages, even after considering that the respondent had suffered depression in addition to other physical injuries suffered by the respondent, was still extremely high. The award was so high that it was as if the award was not compensation for the injuries suffered by the respondent but a reward to the respondent and a punishment to the appellants. Therefore, a global sum of RM300,000 as general damages for pain and suffering and loss of amenities to life to the respondent was fair and reasonable (see paras 31, 34–35 & 37).

(2) On the issue of costs for future treatment, the JC had carefully weighed the evidence of the parties' respective experts and eventually preferred the respondent's expert witness ('PW9') evidence over the appellants' ('DW1') as PW9 had the advantage of directly seeing and examining the respondent, which lent credibility to his testimony; and found PW9's evidence to be more convincing and probable than that of DW1. The JC was justified in doing so. Therefore, the award for costs of future treatment at RM100,000 was upheld (see paras 45–47 & 49).

(3) The reasons stated by the JC on aggravated damages were supported by evidence. The award of RM300,000 for aggravated damages was justifiable, fair and reasonable considering the overall facts and circumstances of this case and therefore was affirmed (see paras 56 & 59–60).

(4) The sum of RM7,500 awarded as costs for the appearance of the respondent's counsel at the High Court was too excessive because there were only three days that the respondent's counsel had attended the court proceeding physically. Therefore, the award was reduced to RM3,000, which was fair and reasonable. The award for costs of advocacy lied within the discretion of the JC as the trial judge. The award of RM50,000 allowed by the JC was fair and reasonable, considering the complexity of the case, the skill, specialised knowledge, responsibility, time and labour required of the respondent's counsel even though the trial eventually went on the issue of quantum of damages only after the appellants' admitted liability some one year after the action was filed. The award was therefore affirmed (see paras 61–63 & 65–66).

(5) The JC only allowed RM6,000 for the costs for the reversal of the stoma operation because this operation could be carried out at government hospitals. The award was fair and reasonable and therefore affirmed. The JC also awarded RM3,600 for the costs of stoma bags pending the implant of the pacemaker calculated at RM300 per month for 12 months. The JC's award for the costs of the stoma bags was pending the implant of the pacemaker, which was yet to take place. If the respondent was claiming for the costs of using the stoma bags since 18 May 2017, the claim should be specifically mentioned and particularised in the pleadings and should be specifically proven during the trial since this was a claim for expenses incurred, ie special damages. Since the claim for the costs of using the stoma bags since 18 May 2017 was never pleaded, the respondent could not now, at this stage, claim for the same. As such, the JC's award of RM3,600 for the costs of stoma bags pending the implant of the pacemaker was affirmed (see paras 69–71 & 74–76).

(6) The respondent actually failed to prove special damages for the respondent's travelling expenses from the respondent's house to the respective hospitals. Regardless, the appellant was able to concede and agree to the sum of RM4,000 being expenses reasonably incurred by the respondent. Thus, the award for the expenses reasonably incurred by the respondent to seek treatment was affirmed (see paras 77–79).

[Bahasa Malaysia summary

Ini adalah rayuan perayu dan rayuan balas responden terhadap keputusan oleh pesuruhjaya kehakiman ('PK') mengenai kuantum ganti rugi yang diberikan dalam tuntutan kecuaian perubatan. Pada 3 Mei 2017, responden melahirkan seorang bayi di Hospital Taiping ('hospital'). Walau bagaimanapun, kemudian didapati bahawa responden mengalami koyakan perineum tahap ketiga, yang menyebabkan kecederaan sfinkter dan pembedahan dilakukan untuk membaiki koyakan tersebut. Pada 16 Mei 2017, responden dirujuk ke hospital kerana luka terbuka semula. Pemeriksaan perineum mendedahkan bahawa keseluruhan panjang jahitan telah terbuka sehingga ke sfinkter dubur. Sfinkter dubur juga didapati longgar. Pada 18 Mei 2017, satu defunctioning stoma telah dilakukan ke atas responden. Semasa sesi susulan, responden diberitahu untuk menangguhukan pembaikan kecederaan sfinkter dan meneruskan pengurusan konservatif, serta pengurusan beg stoma. Responden mendapatkan pendapat kedua dan hadir untuk beberapa susulan di hospital pakar lain. Pada 21 Jun 2018, pasukan pembedahan plastik Pusat Perubatan Universiti Malaya telah melakukan graciloplasty ke atas responden kerana pembaikan bertindih yang gagal akibat kecederaan teruk sfinkter dubur luaran dan kecederaan saraf yang berkaitan. Prosedur tersebut didakwa tidak memperbaiki keadaan responden. Responden mendakwa bahawa kecuaian perayu dalam pengurusannya telah menyebabkan kecederaan dan semua komplikasi yang dialaminya. Responden memfailkan tindakan ini terhadap

perayu dan penghakiman persetujuan direkodkan oleh pihak-pihak di mana perayu mengakui liabiliti, dan ganti rugi akan dinilai oleh mahkamah. Selepas perbicaraan penuh, PK membuat perintah. Perayu dan responden tidak berpuas hati dengan beberapa award yang diberikan, dan oleh itu rayuan dan rayuan balas ini. Perayu membangkitkan isu mengenai: (a) RM1 juta untuk ganti rugi am; (b) RM100,000 untuk kos rawatan perubatan masa depan; (c) RM300,000 untuk ganti rugi teruk; dan (d) RM7,500 untuk kos kehadiran peguam dan RM50,000 untuk kos kepeguaman. Sementara itu responden membangkitkan isu mengenai: (i) di bawah kos ganti rugi masa depan, RM6,000 untuk kos pembedahan pembalikan stoma dan RM3,600 untuk kos beg stoma sementara menunggu implantasi perentak; dan (ii) RM4,000 untuk ganti rugi khas.

Diputuskan, membenarkan sebahagian rayuan perayu dan menolak rayuan balas responden:

(1) Jumlah yang diberikan oleh PK untuk ganti rugi am adalah terlalu tinggi dan merupakan anggaran yang sepenuhnya salah terhadap kerosakan yang dialami oleh responden. Award RM1 juta untuk ganti rugi am, walaupun mengambil kira bahawa responden telah mengalami kemurungan selain kecederaan fizikal lain yang dialami oleh responden, masih terlalu tinggi. Award tersebut begitu tinggi sehinggakan seolah-olah ia bukan pampasan atas kecederaan yang dialami oleh responden tetapi ganjaran kepada responden dan hukuman kepada perayu-perayu. Oleh itu, jumlah keseluruhan RM300,000 sebagai ganti rugi am untuk kesakitan dan penderitaan serta kehilangan kemudahan hidup kepada responden adalah adil dan munasabah (lihat perenggan 31, 34–35 & 37).

(2) Mengenai isu kos untuk rawatan masa depan, PK telah mempertimbangkan dengan teliti keterangan daripada pakar-pakar kedua-dua pihak dan akhirnya memberi keutamaan kepada keterangan saksi pakar responden ('PW9') berbanding pakar perayu ('DW1') kerana PW9 mempunyai kelebihan untuk melihat dan memeriksa responden secara langsung, yang memberi kepercayaan kepada keterangan beliau; dan mendapati keterangan PW9 lebih meyakinkan dan mungkin daripada DW1. PK adalah wajar dalam membuat keputusan sedemikian. Oleh itu, award kos rawatan masa depan sebanyak RM100,000 dikekalkan (lihat perenggan 45–47 & 49).

(3) Sebab-sebab yang dinyatakan oleh PK mengenai ganti rugi teruk disokong oleh keterangan. Award RM300,000 untuk ganti rugi teruk adalah wajar, adil dan munasabah memandangkan keseluruhan fakta dan keadaan kes ini dan oleh itu dikekalkan (lihat perenggan 56 & 59–60).

(4) Jumlah RM7,500 yang dianugerahkan sebagai kos kehadiran peguam responden di Mahkamah Tinggi adalah terlalu berlebihan kerana hanya terdapat tiga hari yang peguam responden hadir ke prosiding mahkamah secara fizikal. Oleh itu, award tersebut dikurangkan kepada RM3,000, yang adil dan munasabah. Award kos advokasi adalah tertakluk kepada budi bicara PK sebagai hakim perbicaraan. Award RM50,000 yang diberikan oleh PK adalah adil dan munasabah, memandangkan kerumitan kes, kemahiran, pengetahuan khusus, tanggungjawab, masa dan tenaga yang diperlukan oleh peguam responden walaupun perbicaraan akhirnya hanya membahaskan isu kuantum gantirugi selepas perayu-perayu mengakui liabiliti kira-kira setahun selepas tindakan difailkan. Award tersebut oleh itu dikekalkan (lihat perenggan 61–63 & 65–66).

(5) PK hanya memperuntukkan RM6,000 untuk kos pembalikan pembedahan stoma kerana pembedahan ini boleh dijalankan di hospital kerajaan. Award tersebut adalah adil dan munasabah dan oleh itu dikekalkan. PK juga memperuntukkan RM3,600 untuk kos beg stoma sementara menunggu implantasi perentak, dikira pada RM300 sebulan untuk 12 bulan. Award PK untuk kos beg stoma adalah sementara menunggu implantasi perentak, yang belum dilakukan. Jika responden menuntut kos penggunaan beg stoma sejak 18 Mei 2017, tuntutan tersebut hendaklah dinyatakan dan dihuraikan khusus dalam pliding dan hendaklah dibuktikan secara spesifik semasa perbicaraan kerana ini adalah tuntutan untuk perbelanjaan yang telah berlaku, iaitu ganti rugi khas. Oleh kerana tuntutan untuk kos penggunaan beg stoma sejak 18 Mei 2017 tidak pernah diplid, responden tidak boleh menuntutnya sekarang, pada peringkat ini. Oleh itu, award PK sebanyak RM3,600 untuk kos beg stoma sementara menunggu implantasi perentak dikekalkan (lihat perenggan 69–71 & 74–76).

(6) Responden sebenarnya gagal membuktikan ganti rugi khas untuk perbelanjaan perjalanan responden dari rumah responden ke hospital-hospital yang berkenaan. Walau bagaimanapun, perayu berserah dan bersetuju dengan jumlah RM4,000 sebagai perbelanjaan yang munasabah ditanggung oleh responden. Oleh itu, award untuk perbelanjaan yang munasabah ditanggung oleh responden untuk mendapatkan rawatan dikekalkan (lihat perenggan 77–79).]

Cases referred to

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal [2013] 4 MLJ 785, CA (folld)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend,

Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)
Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365, FC (refd)
Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239; [1976] CLJU 68, FC (refd)
Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors [2019] 12 MLJ 741, HC (distd)
Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2014] MLJU 1922, HC (refd)
Nurul Rabihah bt Abdul Rahman v Kerajaan Malaysia & Ors [2023] MLJU 3294
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324; [1983] 2 CLJ 198; [1983] CLJ Rep 300, FC (refd)
Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295, FC (folld)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (folld)
Topaiwah v Salleh [1968] 1 MLJ 284; [1968] CLJU 161, FC (refd)

Appeal from: *Nurul Rabihah bt Abdul Rahman v Kerajaan Malaysia & Ors* [2023] MLJU 3294 (High Court, Taiping)

Norazlina bt Mohd Arshad (with Norizan bt Riduan) (Federal Counsel, Perak State Legal Advisor's Office) for the appellant.
Muhamad Hisham bin Marzuki (with Goh Chin Han) (Baharum, Suhaimi & Hisham) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] This is our decision on the appellants' appeal and the respondent's cross-appeal against the learned judicial commissioner ('JC')'s decision on the quantum of damages awarded in a medical negligence claim.

BRIEF FACTS

[2] The learned JC had extensively set out the facts of the case in her grounds of judgment. For this appeal, the pertinent facts can be summarised as follows.

[3] On 2 May 2017, the respondent was admitted to Taiping Hospital ('the hospital') for suspected 'leaking liquor' or leaking of amniotic fluid, which is one of the signs of labour.

[4] On 3 May 2017, at around 3.10pm, the respondent gave birth to a healthy baby weighing 3.65kg. However, it was later discovered that the respondent had suffered a third-degree perineal tear, resulting in a sphincter injury. This is also commonly referred to as obstetric anal sphincter injury ('OASI').

[5] On 4 May 2017, surgery was performed to repair the tear. The respondent was put on antibiotics for two weeks and laxative syrup to prevent wound breakdown.

[6] On 5 May 2017, the respondent complained of loose anal stools and inability to control motion. A rectal examination revealed lax anal tone, and therefore the laxative syrup was stopped. The respondent was discharged with medications on the same day.

[7] On 16 May 2017, the respondent was referred to the hospital by Columbia Asia Hospital due to a wound breakdown. Perineal examination revealed that the whole length of the sutures had opened up until the anal sphincter. The anal sphincter was also found to be laxed.

[8] A consultant and colorectal surgeon then reviewed the respondent's case. A decision was made that an operation to redo the anal sphincter injury repair within two weeks from the first operation was not advisable. The respondent was told that she may need to undergo an examination under anaesthesia to check the degree of the tear and may need a defunctioning sigmoid colostomy to be done.

[9] On 18 May 2017, the examination under anaesthesia and defunctioning colostomy was done. As a result, a decision was made by the consultant surgeon to perform a defunctioning stoma on the respondent.

[10] On 21 May 2017, the respondent was allowed to be discharged. A follow-up appointment was fixed at Sultanah Bahiyah Hospital, Alor Setar, on 23 May 2017.

[11] During the follow-up session, the respondent was told to delay the sphincter injury repair and to continue with conservative management, plus the management of the stoma bags.

[12] The respondent sought second opinions and went for a few follow-ups at other specialist hospitals.

[13] On 14 September 2017, at Pusat Perubatan Universiti Malaya

('PPUM'), an endoanal ultrasound was conducted on the respondent. It was found that there was a 90-degree loss of the internal sphincter (10 to 2 o'clock), which was in keeping with the mixed injury, where the functional loss was more predominant than the anatomical loss. It was suspected that there was an element of traction injury to the pudendal nerve at the time of OASI, causing a neurogenic predominant loss of function.

[14] On 4 December 2017, the respondent was offered to undergo a graciloplasty or sacral neuromodulation ('SN') procedure by the PPUM Plastic and Colorectal team. The respondent was told that the SN device would cost her around RM65,000 minus the surgery.

[15] On 21 June 2018, the PPUM plastic surgery team performed graciloplasty on the respondent because of failed overlapping repair due to severe external anal sphincter injuries and associated nerve injury. The procedure was claimed to have not improved the respondent's condition.

[16] The respondent claimed that the appellants' negligence in her management had caused the injury and all the complications that she had suffered. The respondent proceeded to file this action against the appellants sometime in April 2020 at the High Court.

[17] On 23 March 2021, a consent judgment was recorded by the parties in which the appellants admitted liability, and damages were to be assessed by the court.

[18] The trial proceeded before the High Court to assess the damages. Nine witnesses gave evidence for the respondent, including the respondent herself, and one witness gave evidence for the appellants.

[19] On 19 January 2023, after a full trial, the learned JC had made an order as follows, and we quote:

1. Berkenaan jumlah-jumlah gantirugi dibenarkan adalah seperti berikut:

    a) Jumlah gantirugi khas sebanyak RM19,934.30;

    b) Jumiah gantirugi am kesakitan dan penderitaan bagi kehilangan manfaat kehidupan, meliputi jumlah keseluruhan sebanyak RM1,000,000.00;

    c) Jumlah gantirugi akan datang bagi rawatan Sacral Neuromodulation berjumlah RM100,000.00;

    d) Jumlah gantirugi bagi pembedahan reversal of stoma sebanyak RM6,000.00;

e) Jumlah kos peralatan stoma bagi tempoh (1) tahun bagi setiap bulan sebanyak RM300.00 berjumlah RM3,600.00;

f) Jumlah gantirugi keterlaluan (aggravated) sebanyak RM300,000.00;

g) Kos berjumlah RM 700.00;

h) Kos kehadiran bagi peguamcara ke mahkamah sebanyak RM7,500.00;

i) Kos kehadiran bagi Dr. Milton Lum ke mahkamah sebanyak RM6,500.00;

j) Kos kehadiran bagi Dr. Mohamed Akhtar bin Mohamed Ditali Qureshi ke mahkamah sebanyak RM10,000.00;

k) Kos penyediaan laporan perubatan oleh Dr. Mohamed Akhtar bin Mohamed Ditali Qureshi sebanyak RM1,000.00;

l) Kos tindakan ini sebanyak RM50,000.00;

m) Faedah pada kadar 5% setahun ke atas gantirugi am daripada tarikh pemfailan writ iaitu 30 haribulan April 2020 sehingga tarikh penghakiman iaitu 19 haribulan Januari 2023;

n) Faedah pada kadar 2.5% setahun ke atas gantirugi khas daripada tarikh insiden iaitu 3 haribulan Mei 2017 sehingga tarikh penghakiman iaitu 19 haribulan Januari 2023;

o) Faedah pada kadar 5% setahun ke atas jumlah penghakiman bermula pada 3 haribulan Mei 2017 sehingga tarikh pembayaran jumlah penghakiman;

p) Jumlah penghakiman termasuk kadar faedah hendaklah dibayar kepada peguamcara Plaintif sebagai pemegang taruh;

q) Plaintif diberi kebebasan untuk memfailkan semula tindakan ke mahkamah sekiranya proses rawatan oleh Plaintif tidak berjaya dipulihkan semula.

[20] The appellants and the respondent were dissatisfied with some of the awards given by the High Court, respectively, hence this appeal and cross-appeal.

APPELLATE INTERVENTION ON THE ISSUE OF DAMAGES

[21] At the outset, it is trite that the principle of awarding damages is a matter of assessment and not calculation. It is also trite that an appellate court shall be slow to disturb the amount of damages awarded by the trial court unless it can be proven that the trial court has acted on some wrong principle of law, misapprehended the facts, or the amount awarded is so extremely high or low so as to make it a wholly erroneous estimate of the damage. The court may also refer to the awards that have been granted over the years as guidance.

[22] The above principles can be gleaned from the judgment of His Lordship Azmi CJ (Malaya) (as he then was) in *Topaiwah v Salleh* [1968] 1 MLJ 284; [1968] CLJU 161 as follows:

> The difficulty of laying down the principles on which damages are awarded has frequently been recognised. However, as Lindley LJ in *Rodocanachi v Mibburn Brothers* [1887] 18 QBD 67, 78 stated:
>
> > It must be remembered that the *rules as to damages can in a nature of things only be approximately just, and that they have to he worked out, not by mathematicians, but by juries.*
>
> Or another way of putting it — *that it is a matter of assessment but not of calculation. So far as this court is concerned we should*, to paraphrase Greer LJ in *Flint v Levell* [1935] 1 KB 354, 360 *be disinclined to reverse the finding of a trial Judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide* to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case. (Emphasis added.)

[23] On a similar note, the Federal Court in *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239; [1976] CLJU 68 through His Lordship Suffian LP (as he then was) held as follows:

> Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v Lovell. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.* (Emphasis added.)

[24] Bearing in mind the trite principles of law above, we now turn to consider the issues raised by the parties in these appeals.

THE APPELLANTS' APPEAL

[25] These are the issues raised by the appellants in the present appeal.

General damages

[26] In the present case, RM1m was awarded to the respondent as general damages for pain and suffering and loss of amenities to life.

[27] The learned senior federal counsel ('SFC') for the appellants submitted that the award was extremely high and that it was an entirely erroneous estimate of the damage suffered by the respondent.

[28] On the other hand, the learned counsel for the respondent contended that the award was fair and reasonable, taking into consideration the overall facts and circumstances of the case.

[29] On this issue, we are guided by the principles established by the Federal Court through His Lordship Mohamed Azmi J (as he then was) in *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 as follows:

> In an action for personal injuries, there are two classes for damages which have to be considered — special damage which has to be specially pleaded and general damage which need not be specially pleaded. In both classes of damages, the burden of proof based on the balance of probabilities in the evidence, lies on the plaintiff. Special damage consists of out-of-pocket expenses, such as hospital bills and actual loss of earning during period of total incapacity, and is generally capable of substantially exact calculation. *General damage comprises damage for pain and suffering, loss of amenities and the like which the law implies, and in certain cases where the injuries suffered are such as to lead to continuing or permanent disability, it includes future loss of earnings and loss of earning capacity. Under the heading of pain and suffering and loss of amenities, the quantum is mainly assessed on the nature of injuries sustained and the period of hospitalisation, and in arriving at a figure, the court is guided by previous awards in cases involving similar type of injuries with allowances being given as to the plaintiff's age, marital status, his special position socially or in business, depreciation or appreciation of money value and other relevant circumstances.* As regards loss of future earning and future loss of earning capacity, although such loss can be implied in appropriate cases, the award should be a nominal one, unless the plaintiff can prove such future loss is in fact sufficiently severe to warrant a substantial award. Further, such implied loss can be rebutted by the evidence, and if the evidence does in fact disclose or sufficiently disclose no future loss of earning or loss of earning capacity, no award need be given under these headings. (Emphasis added.)

[30] In the present case, we found that the learned JC had taken into consideration the following factors in awarding general damages, namely:

(a) the respondent suffered a third-degree perineal tear and had to undergo a sphincter repair within 24 hours of sustaining the injury, and the injury has not completely healed since then;

(b) although the injury is a normal injury during childbirth, there were weaknesses in the management of the respondent, which led to further complications;

(c) the respondent had to use stoma bags, and she had difficulties and embarrassment from using them;

(d) the respondent suffers depression in the form of sadness, pessimism, loss of pleasure, self-dislike, crying, loss of energy, concentration difficulty and fatigue;

(e) the respondent is a quality engineer and had to be assigned to light duties for six months due to her condition;

(f) the respondent could not care for her daughter when she was hospitalised; and

(g) the respondent's sexual relationship with her husband was disrupted.

[31] We agree with the considerations of the learned JC mentioned above, but we disagree with the amount awarded by the learned JC. In our view, the amount awarded by the learned JC was extremely high and a wholly erroneous estimate of the damage suffered by the respondent.

[32] The learned SFC referred to the case of *Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors* [2019] 12 MLJ 741. In that case, Faizah Jamaludin JC (as she then was) awarded a global sum of RM80,000 to the plaintiff as general damages for pain and suffering and loss of amenities to life for injuries substantially similar to those suffered by the respondent in the present case. The following can be observed in *Nur Syarafina*'s case:

> [63] By their admission of liability, the defendants admit that the plaintiff suffered injury because of their negligence. The injuries, which are as follows, had caused her considerable pain and suffering:
>
> (a) fourth-degree perineal tear:
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> The first injury the plaintiff suffered *was a third to fourth degree perineal tear*, which is *the worst level of perineal tear*, during the delivery of her child;
>
> (b) anorectal-vaginal fistula:
>
> The second injury the plaintiff suffered was an anorectal-vaginal fistula. The third defendant's own O&G consultant obstetric and gynecologist diagnosed the plaintiff to be suffering from a third degree tear anovaginal fistula, which is an abnormal passageway between her vagina and anus;
>
> (c) *colostomy surgeries:*
>
> The third injury the plaintiff suffered was the colostomy surgeries, namely the:
>
> (i) colostomy surgery performed by SP1 when he performed *the*

rectovaginal repair on 2 June 2014; and

(ii) the reversal of colostomy surgery on 18 July 2014. The *colostomy necessitated the plaintiff to wear a colostomy bag for approximately one and half months*;

(d) caesarean section:

The fourth injury the plaintiff suffered was the *caesarean section that had to be performed for the delivery of the next child*. The child had to be delivered by caesarean section because of the fourth degree perineal tear and the anorectal-vaginal fistula suffered by the plaintiff. SP1 testified that he had advised the plaintiff that she had to undergo a caesarean section for her next birth instead of natural delivery owing to the fourth degree perineal tear and the anorectal-vaginal fistula that she had suffered; and

(e) permanent scars:

The fifth injury suffered by the plaintiff are the *permanent scars* from the colostomy surgery and the caesarean section.

[64] The plaintiff testified that she had also suffered in the following manner as a result of the injuries:

(a) she could not be intimate with her husband for over a year;

(b) her career as a policewoman suffered owing to her prolonged sick leave;

(c) her first child was taken away from her after birth due to her hospitalisations; and

(d) she suffered general embarrassment and discomfort for over a year due to the injuries.

[65] Based on the defendants' admission of liability, the medical records and the internal inquiry report, I accept and believe the plaintiff's testimony. *For this reason, this court awards the global sum of RM80,000 for the pain and suffering and the loss of amenities of life suffered by the plaintiff caused by the defendants' negligence*. (Emphasis added.)

[33] The material difference between the facts in *Nur Syarafina*'s case and this case is that there is evidence to show that the respondent, in this case, had suffered from depression and had undergone psychotherapy sessions due to the injuries that she sustained from the negligent act of the appellants.

[34] We are of the view that an award of RM1m for general damages, even after considering that the respondent had suffered depression in addition to other physical injuries suffered by the respondent, which are substantially similar to the physical injuries suffered by the plaintiff in *Nur Syarafina*'s case, is still extremely high.

[35] The award is so high that it is as if the award is not compensation for the injuries suffered by the respondent but a reward to the respondent and a punishment to the appellants. This runs contrary to the settled law that damages for personal injuries are neither punishment for the defendants' tortious act nor reward to the plaintiff for the injuries suffered.

[36] His Lordship Syed Agil Barakbah FCJ (as he then was) speaking for the Federal Court in *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198; [1983] CLJ Rep 300 held as follows:

> It has to be borne in mind that *damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate. British Transport Commission v Gourley and HW West & Son Ltd v Shepherd* [1963] 2 All ER 625. *The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant* (per Sir Alexander Cockburn LJ in *Phillips v South Western Railway Co* [1879] 4 QBD 406). (Emphasis added.)

[37] Based on the above and the overall facts of the present case, a global sum of *RM300,000* as general damages for pain and suffering and loss of amenities to life to the respondent is fair and reasonable.

Costs for future medical treatment

[38] In the present case, RM100,000 was awarded to the respondent for the costs of future medical treatment, ie, the SN procedure, including the testing of a pacemaker.

[39] The learned SFC for the appellants submitted that the SN procedure should be the last resort and should only be considered after the respondent did a follow-up on the result of her graciloplasty procedure through nerve stimulation and biofeedback, yet her conditions did not improve. According to the learned SFC, since the respondent failed to show that she had followed up with her graciloplasty procedure, the question of undergoing the SN procedure did not arise.

[40] The learned counsel for the respondent, on the other hand, contended that the award was fair and reasonable and supported by expert evidence.

[41] The courts, in their determination of whether the plaintiff is entitled to claim for the costs of future medical treatment, rely on the reasonable, responsible, respectable, and logical opinions of experts. This is because these

experts, being the most knowledgeable in their respective fields, are best equipped to assess the plaintiffs future needs.

[42] We agree with His Lordship Vazeer Alam JC (now FCJ) in *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2014] MLJU 1922 as follows:

> [85] *Thus, in making this once and for all assessment, courts are invariably guided by the opinions of experts and in this regard the court must see that the expert opinion is reasonable, responsible and respectable; and that it stands up to a logical analysis* (see *Bolitho v City Hackney Health Authority* [1997] 4 All ER 771). *The future exigencies of the plaintiff's needs are best determined by educated and well informed surmises and postulations by experts in that field.* The courts have had regard to well established principles in trying to make a reasoned and well informed award of future damages. *The standard of proof regarding future damages is not the balance of probabilities but the possibility or danger of some adverse future developments.* See *Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228 (CA); and *Schrump Et Al v Koot Et Al Lexsee* [1977] 18 OR (2d) 337, where the Canadian Court of Appeal said as follows:
>
> > ... In assessing damages for personal injuries *the award may cover not only all injuries actually suffered and disabilities proved as of the date of trial, but also the 'risk' of 'likehood' of future developments attributable to such injuries.* It is not the law that a plaintiff must prove on a balance of probabilities the probability of future damage: he maybe compensated if he proves in accordance with the degree of proof required in civil matters that *there is a possibility or a danger of some adverse future development.* (Emphasis added.)

[43] We also affirm our earlier decision in *Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal* [2013] 4 MLJ 785. In allowing the claim for damages for future treatment, Her Ladyship Tengku Maimun JCA (now CJ) held as follows:

> [40] *As for future damages, it is not in dispute that Samantha needs long term rehabilitation and therapies*, other supportive treatment and help of developmental psychologist *Dr Malinee Thambyayah, child neurologist and developmental paediatrician ('SP4') who had examined Samantha a number of times, gave a current condition and prognosis report and the costs of rehabilitation care for Samantha. The costing is obtained from the private hospitals/centres*. The learned judicial commissioner accepted the costs stated in SP4's report (exh P12) in awarding future damages in excess of RM4.7m to Samantha. (Emphasis added.)

[44] Furthermore, the Federal Court in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 held as follows:

> In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the

learned trial judge was in line with the current practice on the strength of the decision in *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. I*n determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres.* (Emphasis added.)

[45] In the present case, we found that on the issue of costs for future treatment, the learned JC had carefully weighed the evidence of the parties' respective experts and eventually preferred the respondent's expert witness ('PW9') evidence over the appellants' ('DW1').

[46] In this case, the learned JC's decision to give more weight to PW9's evidence was based on several factors. Firstly, PW9 had the advantage of directly seeing and examining the respondent, which lent credibility to his testimony. Secondly, the learned JC found PW9's evidence to be more convincing and probable than that of DW1.

[47] We affirm that the learned JC was justified in doing so, as previously established by this court in the authoritative case of *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265, which holds:

Even where the competing evidence is that of experts, a trial judge may properly choose between their evidence. The appellate approach in such a case was stated by Lord Diplock in Collector of *Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43 at p 44 as follows:

> The appeal to the Federal Court under s 49 of the Land Acquisition Act 1960 is like any other civil appeal, by way of re-hearing. The Federal Court is entitled to review the inferences and conclusions of the High Court and to draw its own inferences and conclusions: *Aik Hoe & Co Ltd v Superintendent of Lands and Surveys* [1968] 2 MLJ 293. But where the inferences and conclusions of the High Court are based upon findings of primary fact which are dependent upon the credibility of the oral evidence of witnesses whom the trial judge alone has had the advantage of hearing and seeing, an appellate court ought to accept the High Court's findings of primary fact save in very exceptional cases. *Similarly where expert oral evidence of valuers has been called at the trial and discloses a conflict of opinion between them, the judge's finding as to which he regarded as most reliable is entitled to considerable weight though it is less sacrosanct than his findings of pure fact which are dependent upon his view of whether or not particular witnesses were telling the truth.* Finally, their Lordships would observe that land valuation inevitably involves an element of appreciation and impression. There is room for

> divergence of opinion. As in the case of appeals against assessments of damages or against apportionment of blame in actions for negligence an appellate court ought not to reject the judge's assessment and to embark upon a fresh valuation of its own unless it is satisfied for good reason that the judge's assessment must be wrong. (Emphasis added.)

[48] This is a clear finding of fact arrived at by the learned JC. There is no compelling reason before us to disturb such a finding.

[49] PW9 presented evidence that the cost for the respondent to undergo the SN procedure was approximately RM100,000, including the testing of the pacemaker. The claim and the award were both substantiated by expert evidence. Therefore, we uphold the award for costs of future treatment at *RM100,000*.

Aggravated damages

[50] In the present case, RM300,000 was awarded for aggravated damages to the respondent. This significant amount reflects the severity of the emotional distress caused by the respondent's conduct, as determined by the learned JC.

[51] The learned SFC for the appellants submitted that the award was extremely high and ought to be reduced. However, the learned counsel for the respondent contended that the award was not only fair but also reasonable, considering the circumstances.

[52] In the case of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281, the Federal Court confirmed that aggravated damages, in addition to general damages, can be awarded in cases of medical negligence.

[53] It is a well-established principle that aggravated damages are granted to compensate the plaintiff for the injury to their feelings, such as distress or outrage, which is intensified by the reprehensible nature of the defendant's conduct during the negligent act or its subsequent handling by the defendant.

[54] This principle can be found in the speech of Her Ladyship Rhodzariah Bujang FCJ in delivering the majority judgment of the Federal Court in *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor* [2021] 3 MLJ 365:

> [134] Saying this does not mean that the appellants are allowed to walk away scot free for the wrong that had been done to the deceased. Without resorting to or giving a violent interpretation to the clear provision of to s 8(2) of the CLA, on the facts of this case, punishment can and ought to be meted out under aggravated

damages, which the respondents had also specifically prayed for in their statement of claim. *I say this because firstly, from its very nature, aggravated damages is to compensate the victim or as in this case, his estate for the unacceptable behaviour of the appellants.* As stated by the learned author in McGregor on Damages (19th Ed) at p 1653:

> *Aggravated damages come into the picture where the injury to the claimant's feelings is increased by the flagrancy, malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour.* (Emphasis added.)

[135] Thirdly, these two types of damages are intertwined when it comes to this particular tortious claim. Lord Devlin in *Rookes*'s case at pp 1229–1230 recognised and discussed the intertwining principles governing the award of these two damages when His Lordship held as follows:

> The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case; and I can see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such.
>
> This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength which it ought to have. Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law.

[136] What Lord Neuberger said in *Ashley*'s case at p 996 para 102 is equally instructive on this point and is reproduced below:

> 102 *Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant.* (Emphasis added.)

[55] In the present case, the learned JC had considered the following before allowing the award for aggravated damages:

> ... It appeared that the defendants' employees (as identified in the Report) did not have the right credentialing to carry out the sphincter repair in the first instance after the injury was first reported and the injury could have been due to the employees of the defendants' misjudgment or mishandling of the delivery process. However,

there was evidence in the same report that they have acted or behaved inappropriately which led to the negligence and injury suffered by the plaintiff.

[56] We found that the reasons stated by the learned JC are supported by evidence. It can be seen in the evidence that the surgeon who made the first sphincter repair within 24 hours of the injury being reported was not experienced in handling a complicated third-degree perineal tear alone. The surgeon did not have the appropriate credentials to perform the surgery, and she should have sought further assistance from other experienced surgeons. The documentation of the surgery was poor and inadequate. The obstetric team should handle third-degree perineal tears, while the colorectal team should handle fourth-degree perineal tears.

[57] With regard to the respondent's follow-up at the Klinik Kesihatan, her wounds were found dirty on the fifth day of postpartum and referred to the Medical Officer at Klinik Kesihatan on the next day. However, the case was not immediately referred to the Hospital. She had to seek treatment at Columbia Asia Hospital, where she was referred to the Hospital urgently almost two weeks later.

[58] We also note that in *Nur Syarafina*'s case, the plaintiff was awarded RM200,000 as aggravated damages.

[59] In our view, the award of RM300,000 for aggravated damages in this case is justifiable, fair and reasonable considering the overall facts and circumstances of this case.

[60] Therefore, we do not see any reason to disturb the learned JC's award for aggravated damages. We hereby affirm the award of *RM300,000* for aggravated damages.

Costs for counsel's appearance and costs for advocacy

[61] Firstly, RM7,500 was awarded as costs for the appearance of the respondent's counsel at the High Court.

[62] The learned SFC submitted that the sum was too excessive because there were only three days that the respondent's counsel had attended the court proceeding physically, ie, on 20 October 2021, 21 October 2021 and 8 August 2021.

[63] We agree with the learned SFC. Therefore, the award of RM7,500 as costs for the appearance of the respondent's counsel is reduced to *RM3,000*, which is fair and reasonable.

[64] Secondly, the learned JC also awarded the respondent RM50,000 as advocacy costs. The learned SFC submitted that the award was extremely high, considering that the trial before the High Court was only on the issue of the quantum of damages.

[65] However, it is our view that the award for costs of advocacy lies within the discretion of the learned JC as the trial judge. We are of the view that the award of RM50,000 allowed by the learned JC for costs of advocacy is fair and reasonable, considering the complexity of the case, the skill, specialised knowledge, responsibility, time and labour required of the respondent's counsel even though the trial eventually went on the issue of quantum of damages only after the appellants' admitted liability some one year after the action was filed. Therefore, there is no compelling reason for us to disturb this award made by the learned JC.

[66] For the above reasons, we affirm the award of RM50,000 for the costs of advocacy.

THE RESPONDENT'S CROSS-APPEAL

[67] These are the issues raised by the respondent in the cross-appeal.

Costs for future damages: Costs for the reversal of the stoma operation and costs for stoma bags pending the implant of the pacemaker

[68] Incidental to the SN procedure and the use of the pacemaker, the respondent needs to undergo an operation for the reversal of the stoma. The respondent, in her cross-appeal, was dissatisfied with the award, claiming that RM12,000 to RM15,000 is required for this operation.

[69] However, the learned JC only allowed RM6,000 for this claim because this operation can be carried out at government hospitals. We do not see any reason to interfere with the award given by the learned JC.

[70] In our view, the award of *RM6,000* for an operation to reverse the stoma is fair and reasonable. The award is hereby affirmed.

[71] Still, on the issue of costs for future treatment, the learned JC also awarded RM3,600 for the costs of stoma bags pending the implant of the pacemaker. The award was calculated at RM300 per month for 12 months (a total sum of RM3,600).

[72] The learned counsel for the respondent claimed that the award was too low since the respondent has been using stoma bags since 18 May 2017.

[73] In our view, the learned counsel for the respondent's submission was misconceived.

[74] Firstly, it is important to note that the learned JC's award for the costs of the stoma bags above was pending the implant of the pacemaker, which was yet to take place. Secondly, if the respondent is claiming for the costs of using the stoma bags since 18 May 2017, the claim should be specifically mentioned and particularised in the pleadings and should be specifically proven during the trial since this is a claim for expenses incurred, ie, special damages.

[75] Since the claim for the costs of using the stoma bags since 18 May 2017 was never pleaded, the respondent cannot now, at this stage, claim for the same. The principle in *Sam Wun Hoong*'s case is authoritative on this issue. We therefore dismiss this issue for lack of merits.

[76] As such, we affirm the learned JC's award of RM3,600 for the costs of stoma bags pending the implant of the pacemaker.

Special damages

[77] The learned JC allowed RM4,000 as special damages for the respondent's travelling expenses from the respondent's house to the respective hospitals, ie, Taiping Hospital, Columbia Asia Hospital, Adventist Hospital, Sultanah Bahiyah Hospital, PPUM and Hospital Raja Permaisuri Bainun, Ipoh. The respondent claimed RM8,852.84 under this heading.

[78] However, we found that the respondent actually failed to prove this claim. Regardless, the learned SFC was able to concede and agree to the sum of RM4,000 being expenses reasonably incurred by the respondent.

[79] For the reasons above, we affirm the award of RM4,000 as one of the special damages, ie, the expenses reasonably incurred by the respondent to seek treatment.

CONCLUSION

[80] In conclusion, based on the preceding reasons, we allowed the appellants' appeal in part. We hereby order that:

(a) the award of RM1m as general damages for pain and suffering and loss of amenities to life to the respondent is reduced to RM300,000;

(b) the award of RM7,500 as costs for the appearance of the respondent's counsel is reduced to RM3,000;

A (c) the award of RM100,000 for costs of future treatment is affirmed;

(d) the award of RM300,000 for aggravated damages is affirmed; and

(e) the award of RM50,000 for the costs of advocacy is also affirmed.

B **[81]** Also, based on the preceding reasons, we dismissed the respondent's cross-appeal. We hereby order that:

(a) the award of RM6,000 for an operation to reverse the stoma is affirmed;

C (b) the award of RM3,600 for the costs of stoma bags pending the implant of the pacemaker is affirmed; and

(c) the award of RM4,000 as one of the special damages, ie, the expenses reasonably incurred by the respondent to seek treatment is affirmed.

D **[82]** We also hereby order that parties bear their own cost of this appeal.

Appellants' appeal allowed in part and respondent's cross-appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh

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